

34-38-1. Legislative findings -- Purpose and intent of chapter.

(1) The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

(2) The Legislature does not intend to prohibit an employee from seeking damages or job reinstatement, if action is taken by the employer on the basis of an inaccurate test result.

Amended by Chapter 284, 2010 General Session

34-38-2. Definitions.

For purposes of this chapter:

(1) "Alcohol" means ethyl alcohol or ethanol.

(2) "Drugs" means a substance recognized as a drug in the United States Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or supplement to any of those compendia.

(3) (a) "Employer" means a person, including a public utility or transit district, that has one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written.

(b) "Employer" does not include the federal or state government, or other local political subdivisions.

(4) "Employee" means an individual in the service of an employer for compensation.

(5) "Failed test" means a confirmed drug or alcohol test that indicates that the sample tested is:

- (a) positive;
- (b) adulterated; or
- (c) substituted.

(6) "Inaccurate test result" means a test result that is treated as a positive test result, when the sample should not have resulted in a positive test result.

(7) "Licensed physician" means an individual who is licensed:

(a) as a doctor of medicine under Title 58, Chapter 67, Utah Medical Practice Act, or similar law of another state; or

(b) as an osteopathic physician or surgeon under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, or similar law of another state.

(8) "Prospective employee" means an individual who applies to an employer, either in writing or orally, to become the employer's employee.

(9) "Sample" means urine, blood, breath, saliva, or hair.

Amended by Chapter 284, 2010 General Session

34-38-3. Testing for drugs or alcohol.

(1) If an employer tests an employee or prospective employee for the presence of drugs or alcohol as a condition of hiring or continued employment, the employer is protected from liability as provided in this chapter if the employer complies with this chapter. However, employers and management in general shall submit to the testing themselves on a periodic basis.

(2) (a) An organization that operates a storage facility or transfer facility or that is engaged in the transportation of high-level nuclear waste or greater than class C radioactive waste within the exterior boundaries of the state shall establish a mandatory drug testing program regarding drugs and alcohol for prospective and existing employees as a condition of hiring any employee or the continued employment of any employee. As a part of the program, employers and management in general shall submit to the testing themselves on a periodic basis. The program shall implement testing standards and procedures established under Subsection (2)(b).

(b) The executive director of the Department of Environmental Quality, in consultation with the Labor Commission under Section 34A-1-103, shall by rule establish standards for timing of testing and dosage for impairment for the drug and alcohol testing program under this Subsection (2). The standards shall address the protection of the safety, health, and welfare of the public.

Amended by Chapter 284, 2010 General Session

34-38-4. Samples -- Identification and collection.

In order to test reliably for the presence of drugs or alcohol, an employer may require samples from his employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of Section 34-38-6. The employer may designate the type of sample to be used for testing.

Enacted by Chapter 234, 1987 General Session

34-38-5. Time of testing -- Cost of testing and transportation.

(1) Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

(2) An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.

Enacted by Chapter 234, 1987 General Session

34-38-6. Requirements for collection and testing.

(1) The collection and testing of a sample for drugs and alcohol under this chapter shall be performed in accordance with this chapter.

(2) The collection of a sample shall be performed under reasonable and sanitary conditions.

- (3) A sample shall be collected and tested:
 - (a) with due regard to the privacy of the individual being tested; and
 - (b) in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of a reliable sample.
- (4) The sample collection shall be documented. The documentation procedures required by this Subsection (4) include:
 - (a) labeling of a sample so as reasonably to preclude the probability of erroneous identification of test results; and
 - (b) an opportunity for the employee or prospective employee to provide notification of any information that the employee or prospective employee considers relevant to the test, including:
 - (i) identification of currently or recently used prescription or nonprescription drugs; or
 - (ii) other relevant medical information.
- (5) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration.
- (6) (a) Testing of a sample shall conform to scientifically accepted analytical methods and procedures.
- (b) Before a test of a sample may be considered a failed test and used as a basis for an action by an employer under Section 34-38-8, testing of the sample shall include a confirmation test:
 - (i) by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method; and
 - (ii) if the sample used for a test is a urine sample, by a laboratory that is certified by the United States Department of Health and Human Services under the National Laboratory Certification Program.

Amended by Chapter 284, 2010 General Session

34-38-7. Employer's written testing policy -- Purposes and requirements for collection and testing -- Employer's use of test results.

- (1) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to employees and is available for review by prospective employees.
- (2) Within the terms of his written policy, an employer may require the collection and testing of samples for the following purposes:
 - (a) investigation of possible individual employee impairment;
 - (b) investigation of accidents in the workplace or incidents of workplace theft;
 - (c) maintenance of safety for employees or the general public; or
 - (d) maintenance of productivity, quality of products or services, or security of property or information.
- (3) The collection and testing of samples shall be conducted in accordance with Sections 34-38-4, 34-38-5, and 34-38-6, and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

(4) The employer's use and disposition of all drug or alcohol test results are subject to the limitations of Sections 34-38-8 and 34-38-13.

Enacted by Chapter 234, 1987 General Session

34-38-8. Employer's disciplinary or rehabilitative actions.

- (1) An employer may take an action described in Subsection (2) if:
 - (a) the employer receives a test result that:
 - (i) indicates a failed test;
 - (ii) is confirmed as required by Subsection 34-38-6(6); and
 - (iii) indicates a violation of the employer's written policy; or
 - (b) an employee or prospective employee refuses to provide a sample.
- (2) An employer may use a test result or a refusal described in Subsection (1) as the basis for disciplinary or rehabilitative actions, which may include the following:
 - (a) a requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;
 - (b) suspension of the employee with or without pay for a period of time;
 - (c) termination of employment;
 - (d) refusal to hire a prospective employee; or
 - (e) other disciplinary measures in conformance with the employer's usual procedures, including a collective bargaining agreement.

Amended by Chapter 284, 2010 General Session

34-38-9. No cause of action for failure to test or detect substance or problem, or for termination of testing program.

No cause of action arises in favor of any person against an employer who has established a policy and initiated a testing program in accordance with this chapter, for any of the following:

- (1) failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;
- (2) failure to test for, or if tested for, failure to detect, any specific drug or other substance, disease, infectious agent, virus, or other physical abnormality, problem, or defect of any kind; or
- (3) termination or suspension of any drug or alcohol testing program or policy.

Enacted by Chapter 234, 1987 General Session

34-38-10. A cause of action does not arise against employer unless inaccurate test result -- Presumption and limitation of damages in claim against employer.

- (1) A cause of action may not arise in favor of a person against an employer who establishes a program of drug or alcohol testing in accordance with this chapter, and who takes an action under Section 34-38-8, unless the employer takes the action on the basis of an inaccurate test result.

(2) If a person bringing a claim, including a claim under Section 34-38-11, alleges that an employer's action is based on an inaccurate test result:

(a) there is a rebuttable presumption that the test result is valid if the employer complies with Section 34-38-6; and

(b) the employer is not liable for monetary damages if the employer's reliance on an inaccurate test result is reasonable and in good faith.

(3) (a) There is a rebuttable presumption that the employer complies with Section 34-38-6 if as part of the employer's drug and alcohol testing program a licensed physician who is trained in the interpretation of drug and alcohol test results:

(i) provides medical assessment of a result that indicates a failed test;

(ii) requests re-analysis of a test result if necessary; and

(iii) makes a determination whether or not alcohol or other drug use has occurred.

(b) A court may find that an employer complies with Section 34-38-6 notwithstanding that the employer's drug and alcohol testing program does not include an action described in Subsection (3)(a).

Amended by Chapter 284, 2010 General Session

34-38-11. Bases for cause of action for defamation, libel, slander, or damage to reputation.

No cause of action for defamation of character, libel, slander, or damage to reputation arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, unless:

(1) the results of that test were disclosed to any person other than the employer, an authorized employee or agent of the employer, the tested employee, or the tested prospective employee;

(2) the information disclosed is based on an inaccurate test result;

(3) an inaccurate test result is disclosed with malice; and

(4) all elements of an action for defamation of character, libel, slander, or damage to reputation as established by statute or common law, are satisfied.

Amended by Chapter 284, 2010 General Session

34-38-12. No cause of action for failure of employer to establish testing program.

No cause of action arises in favor of any person based upon the failure of an employer to establish a program or policy of drug or alcohol testing.

Enacted by Chapter 234, 1987 General Session

34-38-13. Confidentiality of test-related information.

(1) For purposes of this section, "test-related information" means the following received by the employer through the employer's drug or alcohol testing program:

(a) information;

(b) interviews;

- (c) reports;
- (d) statements;
- (e) memoranda; or
- (f) test results.

(2) Except as provided in Subsections (3) and (6), test-related information is a confidential communication and may not be:

- (a) used or received in evidence;
- (b) obtained in discovery; or
- (c) disclosed in any public or private proceeding.

(3) Test-related information:

(a) shall be disclosed to the Division of Occupational and Professional Licensing:

- (i) in the manner provided in Subsection 58-13-5(3); and
- (ii) only to the extent required under Subsection 58-13-5(3); and
- (b) may only be used in a proceeding related to:

(i) an action taken by the Division of Occupational and Professional Licensing under Section 58-1-401 when the Division of Occupational and Professional Licensing is taking action in whole or in part on the basis of test-related information disclosed under Subsection (3)(a);

- (ii) an action taken by an employer under Section 34-38-8; or
- (iii) an action under Section 34-38-11.

(4) Test-related information shall be the property of the employer.

(5) An employer is entitled to use a drug or alcohol test result as a basis for action under Section 34-38-8.

(6) An employer may not be examined as a witness with regard to test-related information, except:

- (a) in a proceeding related to an action taken by the employer under Section 34-38-8;
- (b) in an action under Section 34-38-11; or
- (c) in an action described in Subsection (3)(b)(i).

Amended by Chapter 152, 2004 General Session

34-38-14. Employee not a person with a disability.

An employee or prospective employee whose drug or alcohol test result is confirmed as positive in accordance with this chapter may not, because of those results alone, be defined as a person with a disability for purposes of Title 34A, Chapter 5, Utah Antidiscrimination Act.

Amended by Chapter 366, 2011 General Session

34-38-15. No physician-patient relationship created.

A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing the test, solely by the establishment of a drug or alcohol testing program in the workplace.

Enacted by Chapter 234, 1987 General Session